Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-530

TEXAS OIL & GAS CORP., GREENBRIAR 74 LIMITED, ZOLLER & DANNENBERG, INC., JOSEPH K. CASKEY and WESSELY ENERGY CORPORATION,
Petitioners
v.
MICHIGAN WISCONSIN PIPE LINE COMPANY and the FEDERAL ENERGY REGULATORY COMMISSION,
Respondents

RESPONSE BY MICHIGAN WISCONSIN PIPE LINE COMPANY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

William J. Legg
- of -
Andrews Davis Legg Bixler
Milsten & Murrah, Inc.
1600 Midland Center
Oklahoma City, OK 73102
(405) 272-9241

Counsel for Respondent

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Respondent Michigan Wisconsin Pipe Line Company accepts all of the preliminary and background statements of Petitioners and the material supplied in the appendices to their Petition. This Respondent therefore submits herein only its reasons for denying the Writ.

REASONS FOR DENYING THE WRIT

The commitment or dedication of the gas underlying the lands covered by Petitioners' leases to interstate commerce was clearly

established by production and sale of the gas in interstate commerce pursuant to appropriate certificates of public convenience and necessity, from 1962 until January, 1969. Under the cases cited by petitioners on page 8 of their Petition for Writ of Certiorari, that dedication could be withdrawn only with the express approval of the regulatory agency, now the Federal Energy Regulatory Commission. Abandonment authority must first be obtained under the regulatory procedure, pursuant to the provisions of Section 7(b), of the Natural Gas Act, 15 U.S.C. §717f(b), (NGA).

Petitioners propose, however, that the recently enacted Natural Gas Policy Act of 1978, 92 Stat. 3350, (NGPA), modifies that requirement by establishing definitions which would exclude petitioners' gas from being subject to the required abandonment proceedings under Section 7(b) of the NGA. In attempting to apply the exclusionary language of Section 2(18) (B) (iii) of the NGPA, it is urged that the gas being sold by petitioners is not subject to the definition of gas "committed or dedicated to interstate commerce."

Petitioners draw from the exclusionary language of the NGPA what they call a three-part test, and in their third part the petitioners wholly fail. Under the NGPA, gas is not "committed or dedicated to interstate commerce"

> "if on May 31, 1978 - - - such natural gas was not being sold in interstate commerce - - -."

The only reason the gas was not being sold in interstate commerce was because the petitioners were, in the absence of abandonment authorization, unlawfully selling the gas within the State, notwithstanding that it was dedicated to interstate commerce by the

previous production, sale and transmission of the gas in interstate commerce under Shell Oil Company's lease and sale to Michigan Wisconsin Pipe Line Company. It is their sale intrastate to Delhi, taking the gas produced from these lands out of the interstate distribution to which it had earlier been committed and dedicated, upon which petitioners rely to meet the third part of their three-part test in attempting to exclude the gas from the definition of "committed or dedicated". Such gas was denied by them interstate application and distribution notwithstanding the prior commitment and dedication, without authorization for abandonment by the Federal Energy Regulatory Commission as required by Section 7(b) of the NGA.

That is to say, without abandonment proceedings having been presented to the regulatory authority, petitioners thereby commenced to sell the gas intrastate. It was this unlawful sale of gas intrastate that was taking place on May 31, 1978, and which petitioners ask to be considered as a qualification by them under the third part of their three-part test. Inasmuch as the gas was not being sold in interstate commerce on May 31, 1978 (even though it should have been), petitioners contend that the gas is not subject to dedication or commitment to interstate commerce. This ignores entirely that the gas had been previously dedicated and committed to interstate commerce, and under the petitioners' authorities remained so until abandonment should be authorized by the regulatory authority. It is truly a boot-strapping operation that petitioners present, using their intrastate sale to demonstrate there was no interstate sale taking place on May 31, 1978, notwithstanding that their intrastate sale was prohibited by the provisions of Section 7(b) of the NGA.

The NGPA exclusion found in Section 2(18) (B) (iii) cannot be applied to petitioners gas, for such gas was subject to sale only in

interstate commerce on May 31, 1978 in the absence of abandonment proceedings under the provisions of Section 7(b) of the NGA.

On it being recognized that the NGPA does not apply to the facts of this case, we believe that it will be seen this court's decision in *United Gas Pipeline Co. v. McCombs*, 47 U.S.L.W. 4728 (June 18, 1979), has decided the issues herein and the Court of Appeals correctly applied that decision to the facts of this case.

Lastly, petitioners' concern over their posture to pursue the procedural requirements of abandonment under Section 7(b) is undeserved. By virtue of the earlier production and sale of the gas into interstate commerce the dedication and commitment were established. Such dedication and commitment continued as a fixed status of the gas notwithstanding the termination of the earlier production, until the abandonment procedure is complied with. Section 7(b) would not deny to petitioners freedom or standing to seek abandonment if public convenience or necessity warranted abandonment.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

William J. Legg
- of -
Andrews Davis Legg Bixler
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